OCT 26 PAGE 17

Supreme Court, U.S.
FILED
OCT 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

No. 79-5215

---

IN THE MATTER OF
ANGELA MARIE OTIS, et al.,
Alleged Neglected Dependent Children
(Pamela Otis Subler, Petitioner)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

---

# REPLY BRIEF OF PETITIONER

---

LOUIS A. JACOBS
Member of the Supreme Court Bar
Supervising Attorney
Clinical Programs

CHRIS BLAIR
Pro Hac Vice
Supervising Attorney
Clinical Programs

SALLY ANN MINOR
Legal Intern
Clinical Programs
College of Law
The Ohio State University
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

OF COUNSEL:
MARK C. STEWART
Pro Hac Vice
General Counsel
Ohio Farmers Association
P.O. Drawer M
Fostoria, Ohio 44830

ATTORNEYS FOR PETITIONER

INDEX


| | PAGE |
|---|---|
| Preliminary Statement . . . . . | 1 |
| Argument . . . . . | 2 |
| A DECISION OF THE FEDERAL CONSTITUTIONAL QUESTION WAS NECESSARY TO THE DETERMINATION OF THE SUPREME COURT OF OHIO . . . . . | 2 |
| Conclusion . . . . . | 6 |


CITATIONS


| CASES | PAGE |
|---|---|
| Abie State Bank v. Bryan, 282 U.S. 765 (1931) . . . | 4 |
| Douglas v. California, 372 U.S. 353 (1963) . . . . | 2 |
| Herb v. Pitcairn, 324 U.S. 117 (1945) . . . . . | 5 |
| Lawrence v. Mississippi Tax Comm'r, 286 U.S. 276 (1932) . . . . . | 4 |
| Long v. District Court of Iowa, 385 U.S. 192 (1966) | 2 |
| Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). . . . . | 5 |


IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5215

IN THE MATTER OF
ANGELA MARIE OTIS, et al.,
Alleged Neglected Dependent Children
(Pamela Otis Subler, Petitioner)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

# REPLY BRIEF OF PETITIONER

This reply brief, filed pursuant to Sup. Ct. R. 24(4), addresses the argument first raised in respondent's brief in opposition that the decision of the Supreme Court of Ohio was based on statutory interpretation of the Ohio Revised Code.

## Preliminary Statement

In her petition for certiorari, docketed on August 16, 1979, petitioner Otis sought review of the judgment and order of the Supreme Court of Ohio, entered on May 18, 1979, dismissing her appeal for lack of a substantial constitutional question.

Petitioner presented the question whether a dismissal of an appeal as of right caused by the denial of a free transcript and court appointed attorney for an indigent mother seeking to appeal an order permanently terminating parental custody violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the United States Constitution.

Petitioner relied on two reasons for granting the writ. First, the question presented raises important constitutional issues decided by the Supreme Court of Ohio but not heretofore decided

by this Court. Second, the question presented has been decided by the Supreme Court of Ohio in a way probably not in accord with applicable decisions of this Court. See Long v. District Court of Iowa, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963).

In the brief in opposition, the only argument respondent asserts is one not addressed in the petition for certiorari. Respondent suggests that the decision of the Supreme Court of Ohio was based on statutory interpretation of the Ohio Revised Code. Petitioner submits that there was no adequate and independent state ground upon which the Supreme Court of Ohio could base its dismissal and that a decision of the federal constitutional question was necessary to its determination.

For these reasons and the reasons stated in the petition for certiorari, petitioner respectfully prays that the Court issue a writ of certiorari.

## ARGUMENT

### A DECISION OF THE FEDERAL CONSTITUTIONAL QUESTION WAS NECESSARY TO THE DETERMINATION OF THE SUPREME COURT OF OHIO

Importantly, Respondent does not contest that the question presented in the Petition raises important constitutional issues decided by the Supreme Court of Ohio, but not heretofore decided by this Court, nor that the question presented has been decided by the Supreme Court of Ohio in a way probably not in accord with applicable decisions of this Court. Furthermore, Respondent does not contest the issue of a free transcript. Instead, Respondent asserts that the petition should be denied because the decision of the Supreme Court of Ohio was allegedly based on statutory interpretation of the Ohio Revised Code and therefore rested on adequate state grounds.



As support for this argument, Respondent asserts two "well-established" principles. One is that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. The second is that where the state decision might have been either on a state or federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not review the decision.

Respondent has admitted that the federal constitutional question -- whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment were violated by the denial of Petitioner's request for a free transcript and court appointed counsel -- was raised on the appellate level and presented to the Ohio Supreme Court. (Respondent's brief p.1) Thus, Respondent places total reliance on its assertion that the adequate and independent state ground principles are applicable to this case. Respondent's assertion is, however, an empty one.

First, the Supreme Court of Ohio, issuing no opinion, dismissed petitioner's memorandum in support of jurisdiction for lack of a substantial constitutional question. That finding, in light of the federal constitutional questions concededly raised, is an adjudication that the federal constitutional questions were without merit. That finding had to arise from the state court's evaluation of the questions presented. Stating that a "substantial" constitutional question does not exist implicitly involves review of the questions asserted. By explaining its dismissal in this way, the state court has explicitly rendered a decision based upon federal constitutional questions.

Second, the state statute cited by Respondent does not deal with the issue of a free transcript for an indigent seeking appeal as of right, but merely addresses the issue of court appointed counsel. Therefore, the only ground for denial of a free transcript would have necessarily involved a determination that such a denial did not violate the Fourteenth Amendment -- a federal constitutional question.

Third, the federal question was also necessary to the court's determination of the issue of court appointed counsel. The mere presence of a nonfederal ground is not the equivalent of the presence of an independent and substantial state ground. Thus, although the state decision may have involved the interpretation of a state statute, this does not necessarily create an adequate state ground. A state ground may become so interwoven with the federal ground as not to be an independent matter; consequently, this Court has jurisdiction to review the decision. Abie State Bank v. Bryan, 282 U.S. 765 (1931). Furthermore, even though the claimed constitutional protection be denied on nonfederal grounds, this Court may inquire whether the state court's decision rests upon a substantial basis. If "the purported nonfederal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory," the appellant may invoke the jurisdiction of this Court. Lawrence v. Mississippi Tax Comm'r, 286 U.S. 276, 282-83 (1932).

Fourth, regardless of how the Ohio Supreme Court may have interpreted the Ohio Revised Code, its interpretation would not provide an independent and adequate state ground. If the court decided the statute precluded court appointed counsel for an appeal as of right, then the statute itself is unconstitutional in that it violates the Fourteenth Amendment. If the court decided that the statute merely did not authorize the appointment of counsel, then the federal constitutional questions still remain: the state statutory ground would not have resolved the federal issue. Therefore, neither interpretation of the statute provides an independent and adequate state ground, and this Court has jurisdiction to decide the federal constitutional questions.

The rationale of the principle of adequate and independent state ground has been described by this court:

> [The purpose] is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Accord, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

In the case at issue, a determination that a denial of a free transcript and court appointed counsel violated the Fourteenth Amendment would not simply revise the state court's opinion; it would correct a wrong judgment on federal constitutional law. The rationale of the principles relied on would not, therefore, apply here.

In the case at issue, the federal question was not immaterial. In upholding the denial of a free transcript and court appointed counsel, the Ohio Supreme Court could not have ignored the issue of the constitutionality of such denial. Thus, the federal constitutional question was presented to the Ohio Supreme Court, and the federal constitutional question was necessary to its determination of the cause.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Supreme Court of Ohio.

Respectfully submitted,


Louis A. Jacobs

LOUIS A. JACOBS
Member of the Supreme Court Bar
Supervising Attorney
Clinical Programs

Chris Blair

CHRIS BLAIR
Pro Hac Vice
Supervising Attorney
Clinical Programs

Sally Ann Minor

SALLY ANN MINOR
Legal Intern
Clinical Programs
College of Law
The Ohio State University
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

OF COUNSEL:
MARK C. STEWART
Pro Hac Vice
General Counsel
Ohio Farmers Association
P.O. Drawer M
Fostoria, Ohio 44830

ATTORNEYS FOR PETITIONER